

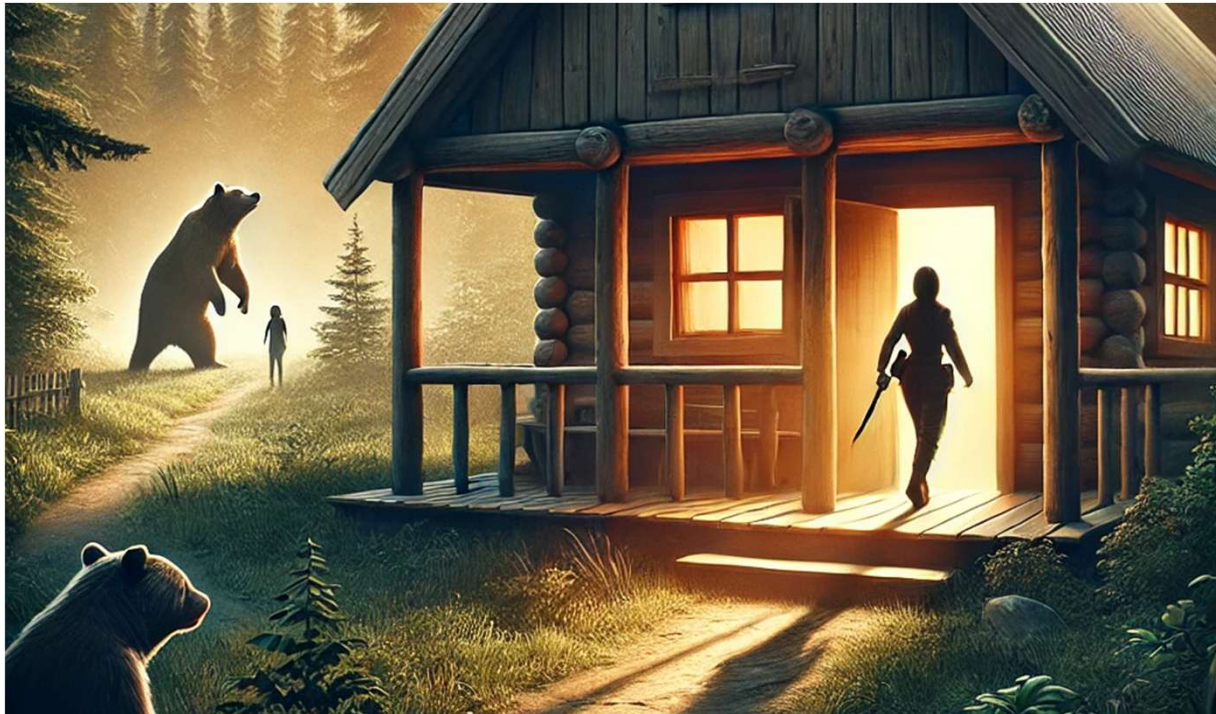


THE QUESTION OF WAR

AN EXAMPLE OF A FORFEITED RIGHT

- **Moral Principle:** All human beings have a moral right **not to be killed**.
- **Scenario:** Max is about to kill Mary with a gun.
- **Question:** If Mary kills Max in self-defense, does she violate his right **not to be killed**?
- **Answer:** No! By attempting **murder**, Max has **forfeited** his moral right **not to be killed**.





AN EXAMPLE OF AN OVERRIDDEN RIGHT

- **Ownership Right:** I own a property in the woods.
- **Moral Principle:** Entering my property without permission **violates my moral right**.
- **Scenario:** Linda, escaping from a bear, breaks into my house to save her life.
- **Key Questions:**
 - Is she morally justified? ☒ Yes!
 - Did I forfeit my right? ☐ No!
 - What happened instead? My **unforfeited right** was **justifiably overridden** in an emergency.

THE MORALITY OF WAR: DEEP VS. SHALLOW

Deep Morality of War

- ◆ Concerns the **moral rights of individuals** in armed conflict.
- ◆ Defines **when rights may be forfeited** and when **unforfeited rights may be overridden**.
- ◆ Philosophical foundation for just war theories.
- ◆ Example: A soldier's right not to be killed unless they pose an unjust threat.

Shallow Morality of War

- ◆ Explores **why and how** laws of war may diverge from deep morality.
- ◆ Takes into account **pragmatic and epistemic constraints** in war.
- ◆ Justifies deviations in legal frameworks for **practical enforcement**.
- ◆ Example: Laws of war prohibit targeting civilians broadly, even if some civilians might be morally liable.

TWO VIEWS ON FORFEITED MORAL RIGHTS IN WAR

- **McMahan's View:**

- Individuals have a **moral right not to be killed**.
- They **forfeit** this right when they become **morally responsible** for an **unjust threat** to others.
- Thus, **civilians and prisoners of war** may be **morally liable to be killed** if they share responsibility for an unjust threat posed by their nation's military or a non-state armed group.

- **Waldron's View (Contrasting Perspective):**

- Individuals **forfeit** their right **not to be killed only** if they are **actively attempting** to **kill or seriously injure** others.
- Once they **cease** these actions, their right **is no longer forfeited**.

WHAT IS WAR FROM A MORAL AND LEGAL PERSPECTIVE?

Key Distinctions

- **Morality of war:** Concerned with **ethical justifications** for actions in war.
- **Laws of war:** A **legal framework** regulating conduct in war.
- The two do not always align—laws may **permit morally wrong acts** or **prohibit morally permissible acts**.

DEBATE ON LAW VS. MORALITY

Should laws of war track deep moral principles?

Should they be **practical guidelines** for soldiers?

The **instrumentalist approach**: Laws should help soldiers act morally **within real-world constraints**.

DEEP VS. SHALLOW MORALITY OF WAR

Deep Morality of War (Jeff McMahan)

- Focuses on **individual rights and justifications** for killing in war.
- A person is **liable to be killed** only if they are **morally responsible** for an unjust threat.

Shallow Morality of War

- Considers **pragmatic constraints**: soldiers **cannot always judge** moral responsibility.
- A **simpler legal standard** helps prevent greater harm.

THE PEN THAT KILLED

Elisabeth Krämer (a fictional character) never fired a shot, yet her words ignited wars. As Nazi Germany's most influential journalist, she crafted propaganda so compelling that it swayed public opinion and shaped military strategy. Her fabricated reports on Poland's "threat" gave Hitler the justification he needed to invade, and her rhetoric fueled the machine of conquest. Her influence had paved the way for countless atrocities.

Was she a legitimate target in war?



ANOTHER EXAMPLE

“Imagine that, in destroying an unjust enemy’s weapons factory, one would, as a side effect, destroy a nearby hospital treating innocent people.”
(Eggert 2022)

Is the attack morally justified if it prevents substantially greater harm to others?



QUESTION

- Laws prohibit killing civilians—even if some might be **morally liable**.
- Can a civilian be morally liable?

Why This Distinction Matters

- Laws of war might be **more restrictive** (prohibiting what morality allows).
- Laws of war might be **more permissive** (allowing what morality forbids).



THE MORALLY BEST LAWS OF WAR

How should laws of war be designed?

- Should laws be based on **deep morality** or **pragmatic considerations**?
- Two perspectives:
 - **Moralists**: Laws should match **deep moral principles**.
 - **Pragmatists**: Laws should **function effectively** in war.

Challenges of Directly Applying Deep Morality

- Morality is **fact-dependent**—soldiers may lack full information.
- Laws must work in **real-time**, guiding soldiers in **uncertain conditions**.
- Example: Killing a combatant **may** be morally wrong, but law allows it **for clarity** in battlefield decisions.

THE HERBALIST'S DILEMMA

Scenario Overview

- Sarah is an herbalist in training, collecting herbal treatments in the woods.
- She encounters Sam, who has been bitten by a poisonous snake and needs immediate treatment.
- Sarah has three herbs: **A, B, and C**:
 - **Herb C**: Will save Sam but cause mild hypersensitivity to the sun.
 - **Herb A or B**: One will **completely cure** Sam with no side effects, but the other will **kill** him.
- Since she cannot recall which herb (A or B) is safe, she decides:
“I ought to give him Herb C.”
- The next day, her professor tells her: “You ought to have given him only Herb B.”



TWO SENSES OF 'OUGHT'

1. Evidence-Relative Ought

- **Based on what Sarah knows at the time.**
- Given her uncertainty, the best choice **based on her evidence** is to give Herb C.
- **Guides decision-making when acting under uncertainty.**

2. Fact-Relative Ought

- **Based on the actual facts of the situation.**
- If she had perfect knowledge, she ought to have given **Herb B**, as that was the completely curative option.

Application to Just War Theory:

- **Laws of war** guide soldiers based on **the evidence-relative sense** of "ought" (what they can reasonably know).
- **The morality of war** considers **the fact-relative sense**, evaluating what was ultimately right or wrong based on the actual facts.

THE MORALLY BEST LAWS OF WAR

What Makes a Law of War “Best”?

- Should laws be based on **deep moral principles** or **pragmatic concerns**?
- Two views:
 - **Moralists**: Laws should **reflect deep morality**, ensuring justice.
 - **Pragmatists**: Laws should be **workable in practice**, even if they diverge from deep morality.

Challenges in Creating “Perfect” Laws

- **Epistemic limits**: Soldiers lack full knowledge of **who is morally liable**.
- **Practicality**: Laws must be **simple** and **enforceable** in the chaos of war.

WHY LAWS ARE MORE RESTRICTIVE

- **Fact-Epistemic Reason:**

- The **fog of war** makes it **too hard** to judge moral liability.
- **Example:** Even if some civilians are **morally responsible**, distinguishing them in **real-time is impossible**.

- **Norm-Epistemic Reason:**

- Moral norms in war are **complex and uncertain**.
- **Example:** Soldiers may disagree on **whether certain actions are justified**—so the law errs on the side of caution.

WHY LAWS ARE MORE PERMISSIVE

- **Fact-Epistemic Reason:**

- Soldiers often **cannot gather enough information** to determine who is a direct threat.
- **Example:** A soldier might hesitate to fire at an enemy who seems **non-threatening**, putting **comrades at risk**.

- **Norm-Epistemic Reason:**

- In fast-moving battle conditions, soldiers **must rely on simple rules**.
- **Example:** Laws allowing attacks on all combatants reduce hesitation and confusion.

WHEN IS MORALITY MORE RESTRICTIVE THAN LAW?

Cases Where Morality Prohibits What Law Allows

- Some acts may be **legally permitted** but **morally wrong**.
- **Example:**
 - Law permits targeting all combatants.
 - **Moral concern:** Some combatants **pose no direct threat** and should not be killed.
- **Why does the law allow this?**
 - **Pragmatic necessity:** Soldiers cannot determine each combatant's threat level.
 - **Operational clarity:** A universal rule prevents hesitation in battle.

Is this justified?

- Depends on whether the law is the **best available guidance** for soldiers.
- If following deep morality **causes greater harm**, the law may be justified despite its permissiveness.

WHEN IS LAW MORE RESTRICTIVE THAN MORALITY?

Cases Where Law Prohibits What Morality Allows

- Some acts may be **morally justifiable** but **legally forbidden**.
- **Example:**
 - A civilian who actively supports an unjust war effort may be **morally liable**.
 - **Legal reality:** Targeting civilians is absolutely prohibited.
- **Why is the law stricter?**
 - **Error prevention:** Avoiding wrongful civilian deaths takes priority.
 - **Maintaining rules of engagement:** Simpler, universal prohibitions **reduce chaos**.

What does this mean for soldiers?

- Even if an act seems morally justified, the law's **broader ethical goals**—such as minimizing mistaken killings—must be considered.

LEGAL VS. MORAL RESTRICTIONS IN COMBAT

Why this structure?

- The law **errs on the side of caution** in civilian cases.
- The law **errs on the side of clarity** in combatant cases.

What does this mean for justice in war?

- Justice may sometimes be **sacrificed** for practicality.
- Laws of war aim to **reduce overall harm**, not enforce individual moral judgments.

Comparing Two Key Questions

Scenario	Moral Judgment	Legal Rule
Killing a non-threatening combatant	Morally wrong	Legally permitted
Killing a civilian aiding an unjust war	Morally justifiable	Legally prohibited

SHOULD LAW OR MORALITY TAKE PRECEDENCE?

Final Considerations

- Morality sets **ideal standards** for just war conduct.
- Law provides **practical guidance** to prevent greater injustices.

The Key Trade-Off

- If laws of war **were fully moral**, they would be **impossible to follow** in real combat.
- If laws of war **ignored morality**, they would lead to **unlimited destruction**.

What should soldiers follow?

- Soldiers must follow the law, even when it seems **morally insufficient**.
- Moral dilemmas in war remain **unavoidable**, but legal clarity is **necessary for order**.

THE MORAL ASYMMETRY BETWEEN KILLING AND LETTING DIE

Why does killing seem worse than letting die?

- Killing is an **active intervention**, while letting die is a **passive failure to prevent harm**.
- **Deep morality** often treats these differently—killing an innocent is usually **worse** than failing to save them.
- In war, this asymmetry influences how laws of war are designed.

Example: Civilian protections in war

- Laws **strictly prohibit** the **active killing** of civilians.
- But laws do not require combatants to **risk their lives to save civilians** from indirect harm.
- **Justification:** Enforcing a duty to save lives could make war **unworkable**.

APPLYING THE ASYMMETRY TO WAR LAWS

How does this asymmetry shape legal rules?

- Laws place **stronger prohibitions on direct harm** than on failing to prevent harm.
- **Example:**
 - A soldier cannot **kill a non-threatening civilian**, even if it would end the war sooner.
 - But the same soldier is not legally required to **rescue civilians** if doing so puts their unit at risk.

Why is this legally necessary?

- In war, imposing an **equal obligation to prevent harm** would create **unrealistic burdens**.
- Legal frameworks **prioritize harm prevention**, but only within **practical constraints**.

WAR CRIMES AND LEGAL ENFORCEMENT

How do war crimes fit into this framework?

- **War crimes** focus primarily on **acts of killing, torture, and destruction**, rather than **omissions**.
- **Why?** Because killing is an **intentional act**, while failing to prevent harm is often **beyond control**.

Example: Targeting civilians vs. failing to protect them

- A soldier who **directly attacks civilians** commits a **war crime**.
- A commander who **fails to prevent foreseeable civilian harm** may **or may not** be held responsible, depending on intent and feasibility.

IS PUNISHMENT JUSTIFIED WHEN LAW AND MORALITY DIVERGE?

When should soldiers be punished for following the law but violating morality?

- If the law **allows an action** but deep morality condemns it, is punishment justified?
- Example: A soldier kills a morally responsible civilian who aids an unjust war.
 - **Moral view:** The civilian was liable, so the killing was **justified**.
 - **Legal view:** All civilians are protected, so the killing was **unlawful**.

Possible justifications for punishment

- **Norm reinforcement:** Maintaining strict laws ensures **consistency and predictability** in war.
- **Prevention of broader harm:** Allowing exceptions would **increase mistaken killings**.
- **Moral error risk:** Even if some civilians are responsible, soldiers **cannot reliably judge** who they are.

THE ROLE OF INTENT IN WAR CRIMES

Should intent matter in war crimes trials?

- If a soldier **honestly believed** they were acting morally, should they still be punished?
- **Two perspectives:**
 - **Strict legalist:** The law must be enforced **regardless of intent** to preserve order.
 - **Moral contextualist:** Soldiers acting on reasonable moral judgment might deserve **leniency**.

Challenges in distinguishing intent

- Proving moral motivation is **difficult**.
- A system that **excuses intent-based violations** could lead to **widespread legal ambiguity**.



WHAT IS A WAR CRIME?

<https://www.youtube.com/watch?v=aXeYxNveUzA>

THE ROLE OF WAR CRIMES IN LEGAL AND MORAL ACCOUNTABILITY

What makes an action a war crime?

- War crimes involve **serious violations of laws of war**, particularly those causing **unjustified harm**.
- Some war crimes are **clear moral wrongs** (e.g., genocide, torture).
- Others exist **primarily for legal enforcement** (e.g., exceeding engagement rules).

Why do war crimes matter?

- They **deter excessive violence** and reinforce legal standards.
- They **provide accountability**, ensuring that unlawful actions have consequences.

WHEN SHOULD WAR CRIMES GO BEYOND THE LAWS OF WAR?

Should war crimes include acts that are legally allowed but morally wrong?

- Some argue war crimes should **track deep morality** more closely.
- **Example:**
 - If a law allows **killing all enemy combatants**, but some are clearly non-threatening, should the law change?

Objections to expanding war crimes

- **Legal clarity:** Soldiers need **predictable rules** in combat.
- **Moral disagreement:** Defining new war crimes **requires moral consensus**, which is often lacking.

CAN WAR CRIMES INCLUDE MALA PROHIBITA ACTS?

Mala in se vs. mala prohibita in war

- **Mala in se:** Acts that are **inherently wrong** (e.g., targeting civilians, torture).
- **Mala prohibita:** Acts that are **wrong because they violate regulations**, not because they are inherently immoral.

Should mala prohibita acts count as war crimes?

- **For:**
 - Ensuring soldiers follow legally necessary restrictions.
 - Maintaining consistency in legal enforcement.
- **Against:**
 - Some legal violations **do not involve moral wrongdoing** (e.g., using prohibited weapons in a justifiable way).
 - Expanding war crimes to include procedural violations **may weaken moral credibility**.

THE COMBATANT DILEMMA — KILLING NON-THREATENING SOLDIERS

Is it always justified to kill enemy combatants?

- **Lawful standard:** All enemy combatants can be targeted.
- **Moral concern:** Not all combatants are equally dangerous—some may not pose a threat.
- **Dilemma:** Does killing a **non-threatening combatant** violate moral principles, even if it is legal?

Possible moral objections

- **Proportionality:** Killing a combatant who poses **no immediate risk** may be **excessive**.
- **Discrimination:** Deep morality would require **targeting only active threats**, but law applies a **broad category**.

Legal justification for allowing all combatant targeting

- Soldiers **cannot assess individual threats in real time**.
- A universal rule **prevents hesitation and battlefield confusion**.
- **Trade-off:** This legal rule **simplifies combat decisions** but may **permit unnecessary killings**.

THE SOLDIER'S MORAL RESPONSIBILITY IN LEGALLY PERMITTED KILLINGS

Can a soldier refuse to follow legal but immoral orders?

- Some soldiers believe certain **legally sanctioned** actions are **morally wrong**.
- **Example:** A soldier refuses to kill a **surrendering but lawful target** because they see it as unnecessary.
- **Key question:** Should soldiers be held accountable for violating legal orders based on moral reasoning?

Tensions between moral autonomy and military obedience

- **Following orders:** Soldiers are trained to act **within legal constraints**, not personal moral judgment.
- **Moral autonomy:** If a soldier believes an action is wrong, should they be **punished for refusing**?
- **Implication:** A strict legal approach **eliminates moral discretion**, while a moral-based approach **risks military breakdown**.

ARE SOME LAWS OF WAR UNJUST?

Can legal protections create moral injustices?

- If laws prohibit **all civilian targeting**, some **morally responsible actors** are wrongly protected.
- If laws **permit killing all combatants**, some **non-threatening soldiers** are unjustly killed.
- **Core issue:** Laws prioritize **clarity and effectiveness** over **perfect moral alignment**.

Should laws be changed to align with morality?

- **Against: Practical difficulties**—combat decisions require **clear, enforceable rules**.
- **For: Justice concerns**—laws should not protect **wrongdoers** or allow **unnecessary killings**.

THE PROBLEM OF SOLDIERS IN AN UNJUST WAR

- Soldiers on the **unjust side** of a war:
 - **Liable** to punishment for targeting **innocent civilians**.
 - **Not liable** for killing **enemy soldiers**, even if done in service of an unjust war.
- **Philosophical Challenge:**
 - If **military aggression** is a crime, why not treat:
 - **Aggressors' killings** of defenders as **murder**?
 - **Defenders' killings** of invaders as **justified homicide**?

Does this distinction hold up under scrutiny?

A CHALLENGE TO TRADITIONAL JUST WAR THEORY

- **Revisionist just war theory**, led by **Jeff McMahan**, draws on thinkers like **Francisco Suarez** and **Francisco de Vitoria**.
- **Key Claim:** Combatants fighting for an **unjust cause** are **not morally entitled** to kill enemy soldiers.
- While there may be **practical reasons** for not punishing them, the **laws of war fail** to align with the **correct moral norms of war**.

Does this perspective demand changes to the laws of war?

THE CONTRACTARIAN APPROACH

A Peace-Preserving Framework

- **Core Principle:** States must work towards **maintaining peace** by renouncing force except in **self-defense**.
- **Minimizing Casualties:** Even when war occurs, peace remains an ideal. Thus, rules should **minimize harm** while allowing belligerents to pursue their war aims.
- **Rules of Engagement:** States **agree in advance** to a common set of war regulations:
 - Combatants may target each other but must **not** target **innocent civilians**.
 - Additional restrictions apply, including bans on **perfidy** and other unlawful methods.

Does this contractarian approach provide a morally justifiable way to regulate war?

RIPSTEIN'S APPROACH

A Critique of Revisionism and Contractarianism

- **Rejection of Revisionism:** Ripstein opposes the idea that combatants fighting for an **unjust cause** are **legally accountable** for killing their opponents.
- **Rules for Wrongdoers:** He criticizes the claim that the **laws of war** should reflect moral liability rather than practical constraints.
- **Rejection of Contractarian Justification:** He denies that the rules of war are best understood as an **agreement between states**, arguing instead that they serve a broader function.

How does Ripstein's view challenge both moral and legal perspectives on war?